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Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

DAVID SCHICK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the district court's coercion of petitioner into abandoning a meritorious USSG argument violate the Due Process Clause?

2. Was petitioner's waiver of his appeal rights knowing and voluntary within the meaning of the Due Process Clause when he was not advised that his waiver applied even to constitutional errors?

3. Was petitioner's right under the Grand Jury Clause of the Fifth Amendment violated by the imposition of an additional and consecutive 27-month prison term for his uncharged commission of an offense while on release?

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OPINIONS BELOW

The summary opinion of the United States Court of Appeals for the Second Circuit affirming petitioner's judgment of conviction is reported as *United States v. Schick*, 2007 WL 4480666 (2d Cir. Dec. 21, 2007) (Calbresi, Cabranes and Sotomayor, *Circuit Judges*), a copy of which is annexed hereto as Appendix A.

The unreported order of the United States Court of Appeals for the Second Circuit, dated March 4, 2008, denying petitioner's petition for rehearing with a suggestion for rehearing *in banc* is annexed hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals which petitioner asks this Court to review was entered on December 21, 2007, and the order denying rehearing was entered on March 4, 2008. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions and statutes are involved in this case:

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . . .

Section 3147, Title 18, provides in relevant part as follows:

> A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense, to —
>
> (1) a term of imprisonment of not more than ten years if the offense is a felony . . .
>
> A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

STATEMENT OF THE CASE

In 1996, petitioner was arrested in the Southern District of New York on charges of mail fraud, and was processed and released the same day. He soon pleaded guilty to mail and wire fraud in both the Southern and Eastern Districts of New York, and cooperated with the government for the next six years ("the First Case").

In October 2003, while awaiting sentencing in the First Case, petitioner was charged with and pleaded guilty to bank fraud based on a check kiting scheme ("the Second Case"). Petitioner's plea agreement in the Second Case, *inter alia*, 1) left open petitioner's Criminal History Category ("CHC") under the United States Sentencing Guidelines ("USSG"); 2) provided for an enhancement for commission of an offense while on release; and 3) waived petitioner's appeal rights if he received a sentence of less than 135 months. A20-A21.[1]

In March 2004, petitioner was sentenced on the First Case to a 12-month prison term. His sentencing on the Second Case, scheduled to take place immediately after his sentencing in the First Case, was adjourned at the suggestion of the district court, and adjourned again to permit the parties to

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1. "A" refers to the joint appendix in the court of appeals; "App. A" refers to the summary opinion of the court of appeals attached to this petition as Appendix A; and "Govt. Brief" refers to the government's brief in the court of appeals dated April 23, 2007.

consider the significance of this Court's decision in *Blakely v. Washington*, 524 U.S. 296 (2004).

After *United States v. Mincey*, 380 F.2d 102 (2d Cir. 2004), which directed district courts in the Second Circuit to sentence in conformity with the USSG until further order of the Court of Appeals, the district court fixed August 18, 2004, as the date for petitioner's sentencing in the Second Case. On the evening before petitioner's sentencing, the Probation Office issued its fourth addendum to the presentence report ("PSR"), and for the first time took the position that petitioner should be sentenced under CHC II because of his sentence in the First Case, when all prior versions of the PSR had concluded that Petitioner was in CHC I. A80.

At his sentencing on August 18, petitioner had not yet surrendered to begin serving his sentence in the First Case, prompting petitioner to argue to the district court that he was still in CHC I, not CHC II. The district court thereupon threatened to remand petitioner immediately if he did not abandon his CHC argument, and petitioner acquiesced to the district court's coercion. A86-A89.

Petitioner also sought to adjourn his sentencing until after this Court decided *United States v. Booker*, 543 U.S. 220 (2005), which was then pending argument, and which would determine the constitutionality of the USSG. Faced with the direction of *Mincey* to continue to apply the USSG, the district court insisted on proceeding with

petitioner's sentencing, but assured petitioner that "[i]f something changes, I will sentence again." A84.

The district court thereupon sentenced petitioner to a 97-month prison term in the Second Case, 27 months of which it expressly attributed to petitioner's alleged commission of the offense while on release in the First Case. A156.

After *Booker* held the USSG unconstitutional, petitioner moved for resentencing consistent with the court's assurance before his sentencing in the Second Case, but the court denied his motion on the grounds that it lacked jurisdiction to resentence petitioner. A183. Thereafter, petitioner withdrew his judgment appeal without prejudice to reinstatement following determination of his petition pursuant to 28 U.S.C. §2255, challenging, *inter alia*, his coercion by the district court into abandoning his meritorious CHC argument, his consecutive 27-month prison term for commission of an offense while on release when he had never been charged by a grand jury for that offense, and the district court's refusal to resentence him in light of *Booker*. The district court denied the §2255 petition, rejecting the first two challenges without reaching the merits based on petitioner's appeal waiver, and rejecting the third challenge on the ground that petitioner had misunderstood the import of the court's assurances before sentencing in the Second Case. A210, A218-19. The district court *sua sponte* denied a certificate of appealability ("COA"), and the court of appeals also denied petitioner a COA, directing the clerk to issue a

scheduling order for petitioner's reinstated judgment appeal.

On the appeal, petitioner challenged his USSG sentence in light of *Booker* and his additional 27-month term for commission of an offense while on release, both of which the government argued were precluded by petitioner's appeal waiver contained in his plea agreement in the Second Case. In opposing petitioner's claim that he had been coerced into abandoning his CHC argument, the government conceded for the first time that petitioner had never agreed to be sentenced in CHC II, and that in concluding otherwise the district court was acting under a misapprehension of fact "fostered" by the government; and by threatening petitioner with an immediate remand if he did not abandon the argument, the court "may have dissuaded" petitioner "from presenting an argument he was entitled to make," so that petitioner's appeal waiver did not preclude him from raising the argument on appeal. Govt. Brief 20-21.

The government nonetheless argued that petitioner's coercion argument had no merit since, unbeknownst to the district court at the time of sentencing in the Second Case, petitioner had been "in custody" for one day, nine years earlier, while he was being processed on his arrest in the First Case, for which the BOP had subsequently granted him one-day credit for "time-served," purportedly mooting petitioner's argument that he had never served a "sentence of imprisonment" prior to beginning to

serve his sentence in the Second case, as the USSG requires.

The Second Circuit affirmed the judgment, and denied petitioner's motion for reconsideration.

REASONS FOR GRANTING THE WRIT

I

This Court has held that adjudication by an unbiased judge is so fundamental that the doctrine of harmless error is irrelevant. *Tumey v. Ohio*, 273 U.S. 510 (1927). Indeed, so fundamental is the right to an unbiased judge that even the appearance of bias can be fatal. As Justice Frankfurter observed, "Justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). In *Offutt* this Court vacated a finding of summary contempt against a lawyer for whom the trial judge had developed a personal animus. This Court held that to avoid the appearance of bias, the district court should have referred the matter to a different judge to conduct a contempt hearing. The fact that the court of appeals agreed with the trial judge that the lawyer's conduct was contemptuous did not alter the analysis, since it was the appearance of justice that had been compromised, even if a contempt citation may have been warranted. *See also Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980) ("[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in

both civil and criminal cases" and the "requirement of neutrality has been jealously guarded by this Court"); *Mayberry v. Pennsylvania,* 400 U.S. 455, 465 (1971); *In re Murchison,* 349 U.S. 133, 136 (1955) ("to perform its high function in the best way justice must satisfy the appearance of justice").

Here, it was not until the evening before sentencing that the Probation Department for the first time recommended that petitioner be placed in CHC II; previously the Probation Department had consistently concluded that petitioner was in CHC I. At his sentencing the next day, petitioner argued that he was not subject to CHC II because he had yet to serve any portion of his sentence in the First Case, and therefore had not served a "sentence of imprisonment" within the meaning of the USSG, which requires a defendant to "have actually served a period of imprisonment on such [prior] sentence." USSG §4A1.2, Comment. (n.2). Upon making that meritorious argument, petitioner was threatened by the district court with immediate remand — mooting his argument — if he did not withdraw the argument. Petitioner acquiesced. As a result of being sentenced in CHC II, instead of CHC I, petitioner received an additional 10-month prison term.

In affirming petitioner's conviction and sentence, the court of appeals avoided resolution of a conflict among the circuits concerning the meaning of the term a "sentence of imprisonment" as used in USSG §4A1.2, by relying on the one day's credit petitioner received as a result of his arrest and

processing nine years earlier. According to the court of appeals, the one day of "time-served" met the USSG's definition of a prior "sentence of imprisonment." App. A6. Petitioner's rehearing petition pointed out that the one-day of credit was awarded by the BOP after petitioner surrendered to begin serving his sentences in the First and Second cases, and was not relied on by the district court. The rehearing petition was denied.

This Court should grant certiorari to determine whether petitioner's coerced abandonment of his CHC argument, whether or not the argument is meritorious (although we believe it is), violated his rights under the Due Process Clause or was so offensive to justice and the dignity of the federal courts that the Court should review the district court's conduct in the exercise of its supervisory power. *See Offutt*, 348 U.S. at 13 (vacating contempt based on "supervisory authority over the administration of criminal justice in the federal courts"); U.S. Sup. Ct. Rule 10(a) (certiorari is appropriate where the court of appeals has sanctioned a lower court's departure "from the accepted and usual course of judicial proceedings").

II

This Court has recognized that to satisfy due process, the waiver of a statutory right, like the right to appeal, must be knowing and intelligent. *See, e.g., United States v. Mendoza-Lopez*, 481 U.S. 828, 840 (1987) (aliens' due process rights would be

violated if they were prosecuted for illegal re-entry after earlier removal proceeding when their waiver of their right to appeal the earlier removal order was not "considered or intelligent");*Gilmore v. Utah*, 429 U.S. 1012, 1014-15 (1976) (Burger, C.J., concurring in order terminating stay of execution) ("next friend" standing was unavailable to death-row defendant since he "knowingly and intelligently, with his full knowledge of his right to seek an appeal . . . waived that right").

This case squarely raises the question of the meaning of the "knowing and intelligent" standard for waiver of the right to appeal. Petitioner was never told by the district court that his appeal waiver would be valid even if the court committed a constitutional error, and certainly this was not something that petitioner would have understood. Indeed, even petitioner's attorney and the district court appeared unsure whether the waiver applied under such circumstances.

Thus, after this Court decided *Blakely* and the parties were debating whether sentencing could go forward, the government argued that petitioner's appeal waiver would prevent him from later challenging his sentence. By contrast, petitioner's counsel took the position that "the law of this Circuit is well settled that the limited waiver of the right to appeal a sentence below a certain Guideline threshold does not operate to foreclose a defendant from prosecuting an appeal when the claim presented to the appellate court is that his sentence . . . violated his constitutional rights." A79.8. The

district court appeared to hold a view similar to petitioner's, since it assured petitioner that, while it intended to proceed with sentencing without waiting for *Booker* to be decided, it could take care of any unfairness in light of *Booker* by resentencing petitioner: "if something changes, I will sentence again."

In short, no one below had a clear understanding of the scope of petitioner's appeal waiver, or whether it would withstand a later holding by this Court that petitioner had been sentenced unconstitutionally, as the government conceded below he was. Under such circumstances, petitioner's appeal waiver was not knowing and intelligent.

The Advisory Committee to the Federal Rules of Criminal Procedure has recognized "the increased practice of including provisions in plea agreements which require the defendant to waive certain appellate rights." Fed. R. Crim. P. 11 advisory committee's note (1999 amendments). Since waivers of appellate rights are now included in virtually every plea agreement in the federal and state courts, and their consequences are so serious, this Court should grant certiorari to decide the new and important constitutional question whether a defendant can knowingly and intelligently waive his appeal rights if he is not told that his waiver will prevent him from challenging even an unconstitutional sentence.

III

Petitioner's Information did not allege or even allude to a violation of 18 U.S.C. §3147 (commission of an offense while on release). Yet petitioner received an additional 27-month sentence for violating that provision of the federal penal code. This Court should grant certiorari to resolve the important and novel question whether §3147 constitutes a separate offense for which a defendant must be formally charged if he is to be punished for its violation.

Jones v. United States, 526 U.S. 227 (1999), and its progeny compel the conclusion that §3147 constitutes a separate offense, entitling petitioner to the attendant constitutional protections, including prosecution only upon grand jury indictment and conviction by a jury beyond a reasonable doubt. Moreover, because §3147 constitutes a separate offense with which petitioner was never charged, he could not have knowingly and voluntarily waived his right to appeal the conviction and sentence for *that* uncharged offense.

Apprendi v. New Jersey, 530 U.S. 466 (2000), made clear that, in determining whether a statute creates a new crime or merely a sentencing factor, "labels do not afford an acceptable answer":

> the relevant inquiry is one not of form, but of effect — does the required finding expose the defendant to a greater

> punishment than that authorized by the jury's guilty verdict?

Id. at 494. In holding New Jersey's hate crime statute unconstitutional, *Apprendi* ruled that where a statute authorizes "an increase [in punishment] beyond the maximum authorized statutory sentence" for the underlying offense, the statute is "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Id.* at 494 n. 19.

When a statutory provision constitutes a separate crime rather than merely a sentence-enhancing factor, the facts constituting the separate crime "must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones*, 526 U.S. at 232 (federal anti-car jacking statute, which subjects defendant to as much as 10 additional years of imprisonment if serious bodily injury results, makes the "serious bodily injury" provision an element of the crime, and not a sentencing factor).

Section 3147 falls squarely within the definition of a new offense under the holdings and rationale of *Jones* and *Apprendi*. The statute authorizes the sentencing court to impose as much as 10 additional years of imprisonment, beyond the statutory maximum imposed by the separate offense of conviction (bank fraud carries a maximum term of 30 years, and §3147 by its terms would subject a bank fraud defendant to as much as 40 years), if the defendant is convicted of committing the underlying

offense while on release. As a result, §3147 creates a new crime.[2]

Since petitioner was never formally charged with a §3147 offense, he could not have been convicted of it, let alone receive enhanced punishment. Increasing petitioner's sentence by 27 months for a crime for which he was not charged or convicted violated his Fifth and Sixth Amendment rights. *United States v. Cordoba-Murgas,* 422 F.3d 65 (2d Cir. 2005) (defendant's allocution "cannot serve to waive the failure to indict him for [a] separate crime"); *United States v. Macklin,* 523 F.2d 193 (2d Cir. 1975) (guilty plea is not equivalent of waiver of indictment, which is surrounded by formality); *see also Midland Asphalt Corp. v. United States,* 489 U.S. 794, 802 (1989) (prosecuting defendant on instrument that effectively is not an indictment or is issued by a body that is effectively

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2. The courts holding that §3147 does not create a separate offense rely on outdated reasoning. For example, in *United States v. Samuel,* 296 F.3d 1169 (D.C. Cir. 2002), the court rejected an *Apprendi* challenge to §3147 based on the reasoning that the Sentencing Commission has characterized USSG §2J1.7 — the guideline provision implementing §3147 — as a "sentencing enhancement" to be found by the court by a preponderance standard, and that the Commission's interpretation is "binding." As *Apprendi* and its progeny recognize, however, the Commission's labels are irrelevant to the question. *Booker,* 543 U.S. at 231 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt") (citation omitted).

not a grand jury would be defects "so fundamental" as to satisfy *Cohen's* collateral order doctrine).

Both the district court and the court of appeals declined to address this important issue because petitioner's plea agreement purportedly waived his right to challenge his "conviction or sentence." A21; App A4-5. Petitioner, however, was not and could not be "convicted" of a §3147 offense because he was never charged with such an offense. Thus, petitioner's plea agreement did not foreclose this challenge. In holding otherwise, the court of appeals erred.

In sum, consistent with petitioner's Fifth and Sixth Amendment rights and Fed. R. Crim. P. 7(a), the district court could not impose on petitioner an additional 27-month prison term, and petitioner did not waive his right to challenge that unconstitutionally imposed punishment for a separate and uncharged offense. This Court should grant certiorari to resolve this new and important constitutional question.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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June 2, 2008

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 21st day of December, two thousand and seven.

PRESENT: HON. GUIDO CALABRESI,
HON. JOSÉ A. CABRANES,
HON. SONIA SOTOMAYOR,

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID SCHICK,

Defendant-Appellant,

FOR APPELLEE: PETER A. NORLING, Assistant United States Attorney, (David C. James, Assistant United States Attorney, *of counsel*), *for* Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York, Brooklyn, N.Y.

FOR DEFENDANT-APPELLANT:

RICHARD A. GREENBERG, (Steven Y. Yurowitz, *on the brief*), Newman & Greenberg, New York, N.Y.

UPON DUE CONSIDERATION of this appeal from a judgment entered in the United States District Court for the Eastern District of New York (Ross, *J.*), it is hereby **ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED.**

Defendant-Appellant David Schick appeals from a judgment of conviction and sentence entered on August 20, 2004, following a plea of guilty to one count of bank fraud, in violation of 18 U.S.C. § 1344. He was sentenced to 70 months' imprisonment for the bank fraud, followed by a consecutive period of 27 months' imprisonment, under 18 U.S.C. § 3147 and United States Sentencing Guideline Section 2J1.7, for the commission of an offense while on release. Schick also appeals from an order of the

district court, entered June 23, 2005, denying a motion for resentencing in light of *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). We assume the parties' familiarity with the facts, procedural history, and scope of the issues presented on appeal.

On appeal, Schick argues that because he was unaware of his rights under *Booker* at the time of his plea, but preserved his constitutional claim before the district court, he should be granted resentencing pursuant to this Court's decision in *United States v. Fagans,* 406 F.3d 138 (2d Cir.2005). He claims that his lack of knowledge vitiates his appeal waiver, which otherwise would preclude him from challenging any sentence below 135 months. This argument is unavailing.

In *United States v. Roque,* 421 F.3d 118 (2d Cir.2005), we held that an "otherwise valid plea agreement and waiver of right to appeal sentence, entered into before January 12, 2005, is enforceable even if the parties, at the time they entered into the agreement, erroneously believed that the United States Sentencing Guidelines were mandatory rather than advisory." *Id.* at 124;*see also United States v. Haynes,* 412 F.3d 37, 39 (2d Cir.2005) (noting that, even in situations in which the defendant preserved an objection to the constitutionality of the guidelines, the possibility of a favorable change in the law is one of the risks that accompanies plea bargains).

Schick, attempting to distinguish *Roque,* argues that the defendant Roque did not move to withdraw his guilty plea, whereas Schick preserved his objection to the Guidelines and indicated that he was willing to withdraw his plea. We have held, however, that even actual motions to withdraw, in themselves, do not suffice to invalidate an appeal waiver. *See United States v. Oladimeji,* 463 F.3d 152, 156 (2d Cir.2006) ("Unless he shows that provision should be invalidated, he is bound by it, regardless of whether he later tried to withdraw from the bargain."). Schick also encourages us to review our holding in *Roque,* in light of the Supreme Court's decision in *Halbert v. Michigan,* 545 U.S. 605, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005). We decline to do so; *Roque* was decided after *Halbert.*

Schick claims that the district court, in comments at sentencing, "promised" to resentence him if conditions changed. Even accepting *arguendo* this interpretation of the district court's comments, we find ample evidence on the record before us to conclude that the waiver was valid when entered. *See United States v. Roitman,* 245 F.3d 124, 126 (2d Cir.2001) ("Although a judge's remark at sentencing might assist interpretation of an ambiguous appellate waiver, it does not affect a waiver that is clear and fully enforceable when entered."(citations omitted)).

Schick next appeals the imposition of a consecutive 27-month term under 18 U.S.C. § 3147. Though he attempts to categorize it otherwise, this

claim is a challenge to Schick's sentence. As such, it is foreclosed by his valid appeal waiver.

Schick's final claim on appeal is that his criminal history category is properly calculated as Category I, rather than Category II, and that the district court erred in coercing him to abandon this argument at sentencing. The government does not rely on Schick's appeal waiver in its response to this claim. It concedes that its own assertions on the subject at sentencing may have been misleading and may have contributed to the district court's failure to consider Schick's argument. Without deciding the question of whether the waiver is effective in this situation, we turn to the merits.

Prior to the sentencing proceedings in the case before us, Schick was sentenced to 12 months' imprisonment for wire fraud. He argues that as he had not *served* any of the previously imposed sentence, he should not receive any criminal history points for a "prior sentence of imprisonment," under United States Sentencing Guideline Section 4A1.2. Schick relies on Application Note 2 to Section 4A1.2, which indicates that "a defendant must have actually served a period of imprisonment on such sentence (or, if the defendant escaped, would have served time)," in order for the sentence to qualify as a "sentence of imprisonment." The government suggests that this Application Note is better read as drawing a distinction between those defendants who receive suspended sentences and those who are sentenced to prison.

We do not need to decide this issue as we find that, in relation to the commission of the wire fraud, Schick was imprisoned for one day on May 22, 1996, and has received one day's credit for time served. As a time-served sentence is clearly a "term of imprisonment" under Section 4A1.2, *see United States v. D'Oliveira*, 402 F.3d 130, 132 (2d Cir.2005), Schick was properly placed in Criminal History Category II, and we deny his request for resentencing.

We have considered all of Schick's claims and find them to be without merit. The judgment of the district court is therefore AFFIRMED.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk of Court

By: /s/_____

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, NY 10007

Catherine O'Hagan Wolfe
CLERK OF THE COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 4th day of March, Two Thousand and Eight,

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United States of America,

Appellee,

v.

ORDER
No. 04-4762-cr(L)
05-3778-cr(Con)

David Schick,

Defendant-Appellant.

Defendant-Appellant David Schick, having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel

rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/
Frank Perez, Deputy Clerk

United States Court of Appeals
Second Circuit
Filed Mar. 04, 2008
Catherine O'Hagan Wolfe, Clerk